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22 OCT 1986

MEMORANDUM FOR: The Director

VIA: The Deputy Director
Executive Director

FROM: Dave Gries

SUBJECT: Supplement to Legislative Program for 100th Congress

REFERENCE: My Memo to you, dated 8 September, Same Subject STAT

Following your approval on 19 September of the legislative program for the 100th Congress, I transmitted the program to the Director, Intelligence Community Staff. In past years, the IC Staff automatically forwarded the program to OMB. However, this year [redacted] and [redacted] have held up transmittal of the legislative program because of their concern that it did not contain all of the legislative proposals recommended in the draft Presidential Report on Counterintelligence and Security. While many of the proposals (e.g., leaks legislation) are already contained in the program, we did not include all of them because the report had not been approved by the President at the time we put our package together. We now understand from [redacted] that the President is about to approve the report and that it will be sent to the Hill shortly. STAT STAT

Given these developments, I agree with [redacted] that it would be inconsistent if our legislative program did not include all of the Presidentially-approved legislative initiatives in the report. Accordingly, I recommend that you approve the attached supplement to the legislative program that covers those proposals not contained in the original Presidential Report. However, you should be aware that many of these proposals are controversial and that other agencies have objected to them in previous years. Attached is a memo to me from [redacted] which explains in detail the proposed supplement to the legislative program for the 100th Congress and requests your decision regarding inclusion of each of the items in the legislative program. STAT STAT

Including the proposals in the legislative program does not mean that they will be incorporated into next year's intelligence authorization bill. We are examining the possibility of drafting a separate Omnibus Intelligence and Security Improvement Act to cover some or all of the items contained in the Presidential Report.

Attachment:
as noted

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OCA 86-3528

SUBJECT: Supplement to Legislative Program for 100th Congress

OCA/LEG/ (21 Oct 86) STAT

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21 October 1986
OCA 86-3529

MEMORANDUM FOR: D/OCA

FROM: [redacted] STAT

SUBJECT: Supplement to Legislative Program for 100th Congress

1. There are six items contained in the Presidential Report on Counterintelligence and Countermeasures that were not included in the legislative program for the 100th Congress. Attached is a short description of each of the items along with a brief analysis of these proposals.

2. Clarification of Security Authorities (#100/1 - 36). This item would establish that the authority of Executive Branch officials to make security clearance and access determinations is not subject to administrative or judicial review under the provision of any statute. Enactment of this proposal would overturn several court decisions which have held that security determinations are subject to court review. We expect that the proposal will be controversial on the Hill and with civil liberties groups since it would be perceived as nullifying the ability of an employee or applicant to seek redress in court. Nevertheless, enactment would significantly reduce the litigation burden on this Agency and strengthen the DCI's hand in the personnel security area.

Decision on Clarification of Security Authorities

	Include in Program	Delete from Program
EXDIR	_____	_____
DDCI	_____	_____
DCI	_____	_____

3. Enhancing the Value of Security Questionnaires (100/1 - 37). This item would establish a civil penalty should it be determined that entries on the personnel security questionnaire were knowingly falsely made or that material information was purposefully withheld. The civil penalty would be equal to the cost to the government for conducting an investigation. This penalty would be in addition to the criminal sanctions now available. OPM has concluded that criminal sanctions do not constitute an effective deterrent to falsification because prosecutions are rarely brought. Requiring an applicant to reimburse the government for the cost of the investigation would be easier than prosecuting that individual and, therefore, such a penalty would

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constitute a more effective deterrent to falsification. However, the Office of Security has expressed a concern, in the past, that creating a civil penalty would make it less likely that criminal sanctions would be brought against those who falsify security questionnaires.

Decision on Enhancing Value of Security Questionnaires

	Include in Program	Delete from Program
EXDIR	_____	_____
DDCI	_____	_____
DCI	_____	_____

4. Protection of Technical Data with Space Application (100/1 - 38). This item would provide NASA with the authority comparable to that provided the DoD to withhold from public disclosure unclassified technical data with space applications and subject to export control. The Presidential Report recommends enactment of this legislation to eliminate a situation whereby information withheld by DoD can be obtained through NASA. We are informed NASA will probably oppose enactment of this provision, notwithstanding its inclusion in the Presidential Report. Without NASA support, it will be difficult for this provision to be enacted into law since Congress is likely to expect NSA, rather than CIA, to take the lead in proposing legislation that would give NASA the ability to withhold technical data with space application.

Decision on Protection of NASA Information

	Include in Program, but require NASA to take lead in proposing bill to Hill w/Agency support	Delete from Program
EXDIR	_____	_____
DDCI	_____	_____
DCI	_____	_____

5. Tort Reform (100/1 -39). This proposal would provide that in a civil action brought against government officials in their personal capacities for official acts, the U.S. will be substituted for the individual defendants. The threat of such suits have deterred security investigators from inquiring into various types of activities that may be alleged to be constitutionally protected although such information may be critical to security determinations. For the past three years, we have included in the draft Intelligence Authorization Bill sent to OMB a provision that would provide Intelligence Community personnel immunity to civil suits for acts committed in their official capacities. Each year, DoJ objects to the provision on the grounds that it would undermine their efforts to obtain relief for the entire government. To date, DoJ efforts to obtain legislative relief have not met

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with much success. Last year, the DoJ also objected on grounds that a government-wide plan to indemnify government officials sued in their personal capacity would make the proposed legislation unnecessary. OMB has consistently sided with Justice on this issue, and we did not include the provision in this year's program because of the existence of both the government-wide indemnification plan and an Agency plan to indemnify employees. While the inclusion of the tort reform proposal in the Presidential report makes it more difficult for Justice to oppose us this year, we believe Justice will still argue the legislation is unnecessary and object to any effort to provide special relief just for Intelligence Community personnel. Should a decision be reached to provide relief for all government employees, it probably would be more appropriate for Justice to take the lead in obtaining government-wide relief.

Decision on Tort Reform

	Include in Program. Require Justice to take lead if proposed relief is government wide	Delete from Program
EXDIR	_____	_____
DDCI	_____	_____
DCI	_____	_____

6. Sanctions for Espionage (100/1 - 40). This item would provide the death penalty for espionage. As you are aware, the entire subject of the death penalty is extremely controversial on the Hill. Furthermore, Justice has for the past several years proposed an omnibus death penalty bill to cover a variety of crimes, including espionage. Justice will most likely oppose any piecemeal attempt at obtaining the death penalty for fear that it would undermine their omnibus death penalty legislation. For this reason, I believe that it would be more appropriate for Justice to take the lead in proposing the death penalty rather than the Intelligence Community.

Decision on Death Penalty for Espionage

	Include in Program, but require that DoJ take lead in proposing bill to Hill	Delete from Program
EXDIR	_____	_____
DDCI	_____	_____
DCI	_____	_____

7. DoD use of the Polygraph for Counterintelligence Purposes (100/1 - 41) This item would give DoD the authority to conduct a permanent counterintelligence polygraph program without an annual numerical ceiling for the conduct of such a program. DoD is currently restricted to a specific

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number of counterintelligence polygraph examinations per year through FY87. Authorization on a year-to-year basis impedes the planning for and execution of an expanded polygraph program. The Presidential report, therefore, recommends enactment of permanent authority for a polygraph program. Because DoD runs this program, it would be appropriate for DoD to take the lead on enacting this legislation with support from the Agency.

Decision on DoD Use of Polygraph

	Include in Program, but require DoD to take lead in obtaining Congressional approval	Delete from Program
EXDIR	_____	_____
DDCI	_____	_____
DCI	_____	_____

8. Once decisions are reached on the above, the supplement to the program will be forwarded through the Intelligence Community Staff to OMB.

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100/1 - 36: Clarification Of Security Authorities

In order to ensure the integrity of security investigations and determinations, the Director of Central Intelligence may include in the proposed Fiscal Year 1988 Intelligence Authorization Act a proposal to clearly establish that the authority of Executive branch officials to make security clearance and access determinations is committed to the discretion of Executive branch officials by law and not subject to administrative or judicial review under the provisions of any statute.

100/1 - 37: Enhancing The Value Of Security Questionnaires

At the request of the Office of Personnel Management, the Director of Central Intelligence may propose or support legislation which would require a person under consideration for a security clearance or access to reimburse the government for the cost of investigation should it be determined that entries on the personnel security questionnaire were knowingly falsely made or that material information was purposefully withheld.

100/1 - 38: Protection Of Technical Data With Space Applications

The Director of Central Intelligence may propose or support legislation which would provide the National Aeronautics and Space Administration with authority comparable to that provided the Department of Defense to withhold from public disclosure unclassified technical data with space applications and subject to export control.

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100/1 - 39:

Tort Reform

In order to ensure the integrity of security and counter-intelligence investigations and decisionmaking, the Director of Central Intelligence may propose or support tort reform legislation which would provide that, in tort actions against government officials in their personal capacities for official acts, the United States will be substituted in such lawsuits for the individual defendants.

100/1 - 40:

Sanctions for Espionage

The Director of Central Intelligence may propose or support legislation which would permit the death penalty to be imposed for espionage convictions.

100/1 - 41:

DOD Use Of The Polygraph For Counterintelligence Purposes

At the request of the Department of Defense, the Director of Central Intelligence may propose or support legislation which would permit DOD to conduct a permanent counterintelligence polygraph program without an annual numerical ceiling for the conduct of such a program.

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